

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK (BROOKLYN)

3 SECURITIES AND EXCHANGE
4 COMMISSION,

Case No. 1:23-cv-05749-CBA-PK

5 Plaintiff,

6 v.

Brooklyn, New York
April 11, 2024
10:42 a.m.

7 RICHARD J. SCHUELER, a/k/a
Richard Heart, et al,

8 Defendants.

9
10 TRANSCRIPT OF INITIAL CONFERENCE HEARING
11 BEFORE THE HONORABLE PEGGY KUO
UNITED STATES MAGISTRATE JUDGE

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1 (Call to order at 10:42 a.m.)

2 THE CLERK: This is civil cause for initial
3 conference, docket 23-CV-5749, Securities and Exchange
4 Commission v. Richard J. Schueler, et al, Magistrate Judge
5 Peggy Kuo presiding.

6 Parties present please state their appearances
7 beginning with Plaintiff?

8 MR. GULDE: Good morning, Your Honor, Matt Gulde for
9 Plaintiff SEC.

10 MR. KURUVILLA: Good morning, Your Honor, Ben
11 Kuruvilla for the SEC.

12 MR. LIFTIG: Good morning, for Plaintiff Richard
13 Heart, Michael Liftig from Quinn Emanuel Urquhart & Sullivan.
14 And I have a number of colleagues here. Kristin Tahler also
15 from Quinn Emanuel and Sam Nitze also from Quinn Emanuel. And
16 I'll let my co-counsel introduce themselves.

17 MR. KURUVILLA: David Kirk, Kirk & Ingram for
18 Defendant Richard Heart.

19 MR. SMITH: Patrick Smith, Clark Smith Villazor for
20 Defendant Richard Heart. Good morning, Your Honor.

21 THE COURT: Good morning, everyone. This is an
22 initial conference before me. I know that there are other
23 procedural matters pending, but I would like to just give
24 everybody an opportunity to tell me a little bit more about
25 what the case is about in short.

1 And then, I know there's a motion to stay discovery,
2 so we can talk about that as well. But like I said, since it's
3 an initial conference, I'll just hear from the -- each of the
4 parties what you think are the important factual procedural
5 legal issues that we need to pay attention to as we move
6 forward.

7 And then, we'll get to the immediate issues at hand.
8 So Mr. Gulde, why don't you start?

9 MR. GULDE: Sure, Your Honor. May I address you from
10 sitting here?

11 THE COURT: Yes, as long as you're talking into the
12 microphone so that it can be picked up.

13 MR. GULDE: This is a case that the SEC brought last
14 summer against Defendant Richard Heart, who is apparently in
15 Helsinki, Finland. Also included with him in the caption are
16 Hex, PulseChain, and PulseX. We've described those as
17 unincorporated alter ego entities of Mr. Heart.

18 This case is about Richard Heart developing Hex,
19 PulseChain, and PulseX crypto asset securities and raising
20 roughly a billion dollars.

21 And so -- in so doing, he raised this money from
22 investors all over the world, but including the United States.
23 He engaged at least one developer, possibly more in the United
24 States, to develop the crypto currencies and platforms. And he
25 targeted American investors and received investment from

1 American investors in amassing that billion dollars.

2 So this is a case about the unregistered offer and
3 sale of securities in those three forms in selling Hex, in
4 selling PulseX, in selling PulseChain, and their related tokens
5 of the same -- we can call them the same names Hex, PulseX,
6 PulseChain or Pulse related to PulseChain.

7 It's also a case about Richard Heart and through
8 PulseChain defrauding the investors in PulseChain. In
9 the -- in raising, let's see, more than \$300 million from
10 PulseChain investors, Mr. Heart used millions of that money
11 directly from investors in PulseChain for his own luxury
12 purposes, buying fancy cars, buying fancy watches.

13 We're able to trace those purchases that went through
14 a complicated crypto currency mixer to apparently to disguise
15 the comings and goings of those assets, but they went to
16 purchase luxury items for him.

17 We're here today under the procedural stance that we
18 are because we haven't been able to come to an agreement about
19 whether discovery ought to move forward.

20 One big reason we haven't is because during the
21 investigative stage, we were -- the SEC was able to serve Mr.
22 Heart in a Miami airport with a subpoena during the
23 investigative stage.

24 That subpoena lawfully requested documents from him
25 related to the development, the rollout of Hex, where's the

1 money, what did you with the money, where did the money come
2 from, who did you pay to develop this thing, all those sorts of
3 questions.

4 He ignored that subpoena. So the SEC had a choice at
5 that point. And I'll also say that in addition to Mr. Heart
6 ignoring that subpoena, the SEC served several subpoenas to
7 people we believed to be promoters and developers of Hex. And
8 they also with very few exceptions ignored those subpoenas.

9 So, at that point in the late summer of '22, the SEC
10 could have gone forward with a bunch of miscellaneous actions
11 to try to compel or to move forward with what we had.

12 You see in the complaint the results of moving
13 forward with what we had. We believe that there is more to
14 know here and that the interests of the public favor moving
15 forward with discovery to develop the more fulsome picture of
16 the story of Richard Heart, Hex, PulseX, and PulseChain. So
17 that's our nutshell.

18 THE COURT: Uh-huh, okay, thank you. So I'll hear
19 from the Defendants.

20 MR. LIFTIK: Thank you, Your Honor. Obviously, we
21 vigorously dispute the characterization of the facts, but I
22 want to focus on just a few items.

23 First of all, counsel repeatedly used the word
24 investors. We reject that and that actually basically presumes
25 the precise question that's at issue in this case, which is

1 whether or not these tokens are in fact securities under the
2 federal securities laws.

3 It is very clear from the record that this is not a
4 case where money was raised from traditional investors, venture
5 investors, or offer, you know, private investors and then a
6 platform was a built.

7 In other words, one critical distinction that this
8 case has from many of the other crypto cases that is not clear
9 from Mr. Gulde's presentation is that this is not an ICO case,
10 an initial coin offering case. This is not a case where sums
11 of money were raised, a platform was built, and then it was
12 later launched.

13 Hex was launched fully built before a nickel flowed
14 into the Hex block chain. And that has very significant
15 implications for the securities analysis.

16 We've also moved to dismiss. And under Judge Amon's
17 rules, we lodge that with the Commission staff, but we don't
18 file it on her docket until briefing is complete.

19 We brought a copy of the motion to dismiss if it
20 would be helpful for Your Honor to review it. We can either
21 transmit it electronically, but we also have a copy here if
22 you'd like.

23 In brief, and I think this begins to get to why we
24 believe a stay of discovery is appropriate, we argue that there
25 are very strong personal jurisdictional defenses.

1 As counsel acknowledged, Mr. Heart is not in the
2 United States. We don't believe the record, particularly as
3 alleged in the complaint, establishes that he purposely availed
4 himself of this forum.

5 One of the things that is actually quite interesting
6 is the letter that counsel filed on Tuesday. We actually think
7 that strengthens our case.

8 In counsel's letter on Tuesday, they have introduced
9 new facts that were not alleged in the complaint. That is in
10 the letter.

11 You can -- I'm happy to point you to those, but we
12 think we've already hit a nerve with our motion that there are
13 failings in the complaint and it has not alleged sufficient
14 facts to put him here in the United States subject to this
15 Court's jurisdiction.

16 In addition, the securities laws require that the
17 alleged domestic transactions in securities under the Morrison
18 v. National Australia Bank case, we believe and we argue in our
19 motion to dismiss that the SEC has failed to allege domestic
20 transactions.

21 Simply pointing to the fact that people in the United
22 States may have acquired Hex tokens is insufficient under
23 Morrison and the supporting case law such as absolute activist.
24 So much they're controlling 2nd Circuit case. They actually
25 need to allege where irrevocable liability was incurred. And

1 the complaint does not do that.

2 We raise arguments concerning whether or not they've
3 alleged the foundational contract required under the investment
4 contract analysis under the securities laws.

5 And then, we've also raised, and this is novel to
6 this case, but we think a critically important issue First
7 Amendment arguments.

8 Much of the complaint focuses on the words that Mr.
9 Heart said. And the complaint alleges that those words, the
10 words that they have cherry picked out of hours and hours of
11 YouTube videos that Mr. Heart recorded make this code, these
12 Hex tokens a security.

13 Now one of the things that the complaint does is it
14 dismisses out of hand other words that Mr. Heart said where he
15 explicitly disavows particular aspects that the Commission
16 would need to show to establish a security.

17 So this case presents really an interesting case
18 where some of -- under the Commission's use, some of Mr.
19 Heart's word create a security, but they ignore the other words
20 that show why it's not a security. So we think that that
21 actually raises important First Amendment issues.

22 In addition, counsel mentioned the PulseChain and
23 PulseX projects. Those projects were explicitly undertaken with
24 a free speech direction.

25 The idea was that people contributed to that project

1 if they -- to show that they believe in free speech, that they
2 believe in blockchain.

3 And those very express words again that the
4 Commission chooses to ignore where Mr. Heart said you're
5 sacrificing your money. I promise you nothing. If you donate
6 to this project, the money is gone. Nothing will come of it.

7 So there are some very serious hurdles that we think
8 the Commission has not and cannot overcome on the pleadings.
9 It's a bit of a sidebar, but it's also worth noting that the
10 caption, these three entities Hex, PulseChain, and PulseX that
11 are in the complaint, we here at counsel table only represent
12 Mr. Heart.

13 And something that's going to be grappled with and
14 needs to be grappled we think is another reason why the motion
15 to stay is appropriate is we don't really understand how they
16 purport to name these three entities as Defendants, or they're
17 not entities, I misspoke.

18 Hex as they allege is a token. It's a piece of code.
19 PulseChain, they allege purports to be a fork of the Ethereum
20 blockchain. So post chain is a database.

21 And PulseX, they describe as a decentralized protocol
22 on the Ethereum block chain. Again, code.

23 We're quite frankly confused as to how you can name
24 bits of code as Defendants, how you can say that bits of code
25 are alter egos. That needs to be resolved before we can

1 proceed with discovery.

2 There's more to say on the motion to stay. So I know
3 I've gone a little bit past it. And I'm happy to continue or
4 if Your Honor has questions before we get to that.

5 THE COURT: I did. So you say that you're
6 representing Mr. Heart, not Hex, PulseChain, or PulseX?

7 MR. LIFTIK: That's correct.

8 THE COURT: So is anybody representing those three
9 entities?

10 MR. LIFTIK: Not that we're aware of, Your Honor.

11 THE COURT: So, technically, they would be in default
12 by not being represented?

13 MR. LIFTIK: I don't --

14 THE COURT: They're named as Defendants, and whether
15 they're proper Defendants or not is a different issue, but if
16 you're clearly not representing them, then the procedural
17 posture is that they will be in default.

18 And you're not here to speak on behalf of them
19 whether they're entities or code or something else. So we just
20 want to be clear that they're -- they, if they were found to be
21 proper entities are in default by virtue of not appearing?

22 MR. LIFTIK: Well, I don't think they've been served.

23 THE COURT: Oh, okay. So, okay. That sounds good.

24 And I also notice everybody's been saying Mr. Heart, even
25 though the caption is Mr. Schueler. So is Mr. Schueler not his

1 name? It's Mr. Heart?

2 MR. LIFTIK: His preferred name is Mr. Heart. His
3 legal name is Mr. Schueler.

4 THE COURT: Okay, okay, so we should be calling him
5 Mr. Heart. And then, I understand that your motion to dismiss
6 is on two grounds, personal jurisdiction and First Amendment;
7 is that right?

8 MR. LIFTIK: It's on a number of grounds. It's on
9 personal jurisdiction, so 12(b)(2). And then 12(b)(6) and the
10 grounds for the motion include what we call the Morrison
11 argument, what we call the no contract argument, the First
12 Amendment argument.

13 And then, they've also alleged a fraud claim. And so
14 under Rule 9(b), we've alleged that or we contend that they've
15 not met the particularity requirements of Rule 9(b).

16 THE COURT: All right, okay. And the Morrison
17 argument is a personal jurisdiction one, isn't it?

18 MR. LIFTIK: It is not actually, Your Honor.
19 Morrison is a substantive holding that is not a jurisdictional
20 holding, even though it sounds in jurisdiction or standing, but
21 it's been held not to be.

22 THE COURT: Right. And for personal jurisdiction
23 purposes, not every fact needs to be within the four corners of
24 the complaint, right? Personal jurisdiction could be based on
25 things that are developed as facts on the record. It doesn't

1 have to be in the complaint.

2 MR. LIFTIK: We're aware that it can extend the four
3 corners. What we had when we filed our motion to dismiss was
4 only the four corners of the complaint.

5 And if Commission would choose to put forth evidence
6 to -- then we can sort of address that in supplemental
7 briefing.

8 THE COURT: Right.

9 MR. LIFTIK: The point that I wish to raise in their
10 letter is that they've already started to bring in some without
11 citation, they've started to bring in extra allegations, but
12 there's no citations. There's no evidence. They've just
13 started to allege additional I guess I call them facts, but
14 they're not really before us.

15 THE COURT: Right. And the motion to dismiss has
16 been served. The opposition has not yet been served. So you
17 don't --

18 MR. LIFTIK: I don't what the arguments will be,
19 correct, Your Honor.

20 THE COURT: All right, that's fair, thank you. So
21 thank you for that overview. That was very helpful.

22 Let me hear then with regard to discovery what the
23 Commission is intending to be the scope of the discovery and if
24 you have any kind of plan in terms of the stages of the
25 discovery that you're proposing.

1 And then, I'll hear from the Defendant as far -- and
2 I'll just say Defendant because it's you're only the one about
3 why that should not go forward, okay?

4 So, Mr. Gulde, I'll hear from you.

5 MR. GULDE: Sure, Your Honor. Our first ask is that
6 we move forward with discovery as it would be in any case where
7 we would serve discovery, both written discovery, document
8 discovery, and eventually, a deposition, but that wouldn't be
9 right away from Mr. Heart.

10 And notably, although we mentioned in our letter it
11 does answer some of the complexity here, you know, we believe
12 we've served Hex, PulseX, and PulseChain to the extent you can
13 serve them.

14 And granted, there is some uncertainty here partially
15 because we weren't able to conduct a fulsome investigation
16 because of Mr. Heart's noncompliance.

17 But we do believe they had been served. But we also
18 believe as we said in our letter that anything that we'd be
19 seeking of Hex, PulseX, PulseChain could be answered by the
20 human being Richard Heart.

21 So our ask would be to just start with discovery. We
22 don't need depositions right away. That can wait from the
23 parties through Mr. Heart.

24 And then also, on a -- on the same track, immediately
25 start discovery on those third-parties that we mentioned

1 including promoters, developers of Hex, PulseX, and PulseChain.

2 We are happy to discuss fallback positions if the
3 Court is reluctant to let discovery go forward on that sort of
4 full spectrum.

5 One that makes sense immediately would be something
6 that would give the SEC access to materials that we asked for
7 19 months ago as part of the investigation. So document
8 discovery from Mr. Heart related to all of these offerings,
9 coinciding with an effort to open up full discovery as to
10 third-parties.

11 And I don't believe that would prejudice the
12 Defendants because they've got plenty of folks to handle
13 defending any of those depositions or raising any issues that
14 they see fit.

15 So, you know, that's our big ask. And then, that's
16 our fallback.

17 THE COURT: Okay, for purposes of responding to the
18 motion to dismiss, do you need discovery?

19 MR. GULDE: Need is a tough question. I don't think
20 we need it. To represent my client ably, I think I do say we
21 need it because there are things that are left to be found from
22 Mr. Heart from third-parties that would certainly be relevant.

23 So while I think we can survive a motion to dismiss
24 without it, that would not be competent advocacy. And we
25 should absolutely seek additional discovery to what we have

1 right now to ably do that.

2 THE COURT: Well, I guess I shouldn't be so cryptic.
3 Do you need personal jurisdiction discovery because I've seen
4 that happen in other cases where if the challenge is to
5 personal jurisdiction, sometimes the party defending says I
6 don't actually know. I -- we have this kind of information,
7 but we need more discovery to get the full spectrum.

8 MR. GULDE: Maybe I'm being too cute. I'm confident
9 where we are.

10 THE COURT: Okay, that's fine.

11 MR. GULDE: But yes, we need it in that we're going
12 to seek it and it will definitely be relevant to the issues of
13 personal jurisdiction.

14 THE COURT: Okay. So it's just a dispute as to the
15 word need, okay.

16 MR. GULDE: But I think it's a yes.

17 THE COURT: Okay. And for the third-party, those are
18 nonparties. So you mentioned that the Defendant might want his
19 lawyers present, but you're not seeking the discovery? The
20 promoters and developers as far as you know are as you call
21 them third-parties nonparties?

22 MR. GULDE: Your Honor, I don't know -- I have no
23 idea if they're represented by any of these folks or if they
24 are associated with Mr. Heart in a way that would make them
25 parties to this case or aligned with the party in the case.

1 And I mention that just to say that they certainly
2 can attend the depositions of those folks.

3 THE COURT: Right, but in assessing burden,
4 that's -- that would be the extent of burden there might be on
5 the Defendant?

6 MR. GULDE: That's right.

7 THE COURT: Yeah, okay, very good. Thank you.

8 So Mr. Liftik or somebody else with Defendant?

9 MR. LIFTIK: Thank you, Your Honor. Just taking a
10 step back and looking at the test for why we believe that a
11 stay of discovery is warranted, it's a three factor test as I'm
12 sure Your Honor is familiar with.

13 Strong showing that the claim is unmeritorious,
14 breadth of the discovery that is sought, and the prejudice
15 might be, that might be suffered by the other side.

16 We want to really just focus on -- walk through those
17 briefly. On the merits of the motion to dismiss, why we
18 believe the claim is unmeritorious for these purposes, we're
19 really focusing on two arguments, the personal jurisdiction
20 argument and the Morrison argument. Our Rule 9(b) obviously
21 does not dispose of the entire case, so we're putting that
22 aside for these purposes.

23 There's a number of cases that support us. We think
24 the Vida Press (phonetic), Eastern District of New York 2022
25 and the Paladino (phonetic) case of Eastern District of New

1 York in 2024, those are magistrate judge orders granting stays
2 of discovery.

3 And we think they're particularly instructive because
4 there's motions to dismiss raise personal jurisdiction
5 challenges.

6 And the Paladino case actually goes even further. I
7 think there's a nice analogy in one of the arguments in a
8 motion to dismiss was an anti-trust standing argument.

9 That's a -- I'd say that's sort of a rough analogy to
10 the Morrison argument in terms of whether or not there's even a
11 domestic securities transaction such that the case can go
12 forward for the Commission.

13 So, you know, obviously, I'm not here to have a
14 hearing on a motion to dismiss, but on personal jurisdiction, I
15 think Your Honor only needs to look to Judge Amon's Plexcorp.
16 (phonetic) case, which essentially reads like a checklist of
17 the things not alleged in the complaint.

18 In that case, they allege business travel to the
19 United States. They allege the use of U.S.-based payment
20 systems. And they alleged transactions on a website that was
21 hosted and purchased from a U.S. website hoster.

22 None of those things are alleged in our complaint.
23 And we think that the record and our motion establishes that he
24 didn't reach out and avail himself of the forum in any
25 capacity, which is as required under the SPV Osus (phonetic)

1 case, which is 2nd Circuit from 2018.

2 Any statements made by Mr. Heart on the Internet,
3 those are general statements. There's a pretty robust body of
4 case law that talks about simply taking advantage of the
5 Internet does not create jurisdiction in the United States.

6 The Commission has raised the issue that part of the
7 technologies that we're talking about here are based on
8 something called Uniswap, which is an existing decentralized
9 exchange.

10 And they make the point that Uniswap was developed by
11 people who live in Brooklyn. Well, if we unwind that a little
12 bit, there's no allegation or could there be that Mr. Heart is
13 affiliated in any way with Uniswap.

14 And so, simply saying that because Uniswap is based
15 in the United States or the developers, Uniswap is
16 decentralized, it's all over the world, but the Uniswap
17 developers were based in Brooklyn, if you build something based
18 on that, that gives you jurisdiction.

19 And that's essentially like saying if you issue
20 French bonds from a French company, but you base the bond
21 indenture on a form that you found from the United States, that
22 those French bonds would be subject to U.S. jurisdiction. It
23 just doesn't track.

24 THE COURT: Where was your client when he made these
25 statements?

1 MR. LIFTIK: Well, they're outside the United States,
2 entirely outside the United States.

3 THE COURT: Okay, so and the statements you said were
4 just on the Internet, not directed at the United States?

5 MR. LIFTIK: Correct. These are posted generally for
6 anyone in the world to see on the Internet.

7 THE COURT: And where would they posted?

8 MR. LIFTIK: YouTube and other channels.

9 THE COURT: Okay, go ahead. I was just curious about
10 that.

11 MR. LIFTIK: Sure. There's -- the Commission argues
12 in their letter that Morrison does not apply to Section 5
13 cases. There's contrary authority to that.

14 The Hallsworth v. Bee Protocol (phonetic) case and
15 the recent decision by Judge Torres in the Southern District in
16 the Whipple (phonetic) case established that Morrison can be
17 used to show that you need to allege a domestic transaction for
18 a Section 5, which is the unregistered transactions allegation
19 that they have.

20 So the point, and obviously we can get into more
21 here, but the point is that these are strong arguments that we
22 believe pose a serious threat to the entire action.

23 On the burden and the breadth of discovery, let's
24 pause and focus on the subpoena that Mr. Gulde mentioned. The
25 SEC has had extensive opportunity, unique opportunities as a

1 civil litigant, that regular civil litigants don't have to
2 conduct in investigation before they file their action.

3 And as Mr. Gulde has described, they alleged they
4 served a subpoena on Mr. Heart. They also allege that they
5 served all kinds of other manner of subpoenas on third-parties.
6 And then, they did nothing.

7 THE COURT: Well, I thought that Mr. Gulde's
8 description was that your client, ignored the subpoena that was
9 properly served.

10 MR. LIFTIK: They're alleging Mr. Heart did not
11 respond to the subpoena, but the SEC has unique tools.

12 THE COURT: But did he respond to the subpoena and
13 they just missed it?

14 MR. LIFTIK: No, he did not.

15 THE COURT: Okay, so he didn't respond?

16 MR. LIFTIK: He did not respond to the subpoena, but
17 they did not move to compel. They did not seek to follow up
18 with him in any way.

19 We're not aware of any miscellaneous actions seeking
20 to compel production of documents for any of these
21 third-parties that they have subpoenaed.

22 The idea that it's now been 19 months since that
23 subpoena was served, the idea that suddenly now we need to
24 engage in discovery when they could have pursued other
25 remedies, it's not to say discovery shouldn't happen at some

1 point, but to let them play out, let all jurisdictional
2 arguments play out it's particularly in part where you're
3 talking about a defendant that is not in the United States.

4 So the idea of Mr. Heart being subjected to discovery
5 in our contention that is that this Court does not have
6 jurisdiction over him is why we're particularly moving here for
7 a stay of discovery.

8 Let's also look at what we think the burden could be.
9 And we're not here to argue that there aren't lawyers to help
10 deal with it.

11 But the subpoena that the investigative subpoena that
12 the SEC attached to their letter gives us a roadmap for what
13 they would ask for.

14 And it's exceptionally broad. They seek all kinds of
15 personal financial information from Mr. Heart, all these
16 communications with participants in the Hex project or any
17 individual discussing Hex is a virtually unrestricted request
18 for Mr. Heart's communications over years relating to this
19 project that they allege he's been at the center of. All
20 documents related to the development of Hex. That -- extensive
21 documents.

22 So, you know, we know that the -- we know that
23 the -- we're going to be fighting about a very broad subpoena
24 if regular discovery were to open.

25 And then, we have this issue of the parties. In

1 their investigative subpoena, they refer to Hex the way one
2 would refer to a company. They say Hex includes all its
3 parents and affiliates, et cetera, et cetera.

4 Well, we've got to resolve this. Just because they
5 allege that it's a unincorporated entity doesn't make it so.

6 THE COURT: How will it be resolved?

7 MR. LIFTIK: Well, I mean, our contention is that Mr.
8 Heart only has his own documents and there is no Hex's code.
9 That's our position. And I think it's their burden to
10 establish that somehow Hex is something other than that.

11 If we go to the risk of prejudice, as we've talked
12 about, we think that there's very little risk of prejudice.
13 They -- the Commission's been content to let these subpoenas go
14 unresponded to for, you know, 19 months now.

15 And so waiting a few more months for the motion to
16 dismiss, process to play itself out, we don't believe would
17 hurt the Commission's interests here.

18 All that said, Your Honor, you know, while we believe
19 that discovery should be stayed as we put in the record, we did
20 approach the Commission about limited discovery and we weren't
21 able to -- well, they said, no, they needed full discovery. So
22 that's fundamentally why we're here today.

23 THE COURT: Okay, and what is your proposal for
24 limited discovery?

25 MR. LIFTIK: I'm confident that if your order were to

1 honor it -- order it, we could have a productive meet and
2 confer and come up with some agreement, but we believe that
3 there are some ways to limit discovery.

4 Off the top of my head, some of the ideas could be
5 Rule 26 disclosures and perhaps some limited RFPs. Another way
6 to approach it will be to talk about producing actual documents
7 but leave e-coms, you know, emails and messages, et cetera for
8 later because that's where things start to get very burdensome
9 and significant.

10 THE COURT: Okay. All right, great.

11 And Mr. Gulde, I don't remember if you addressed the
12 three-prong test particularly. So I'll just give you a quick
13 opportunity if you want to.

14 MR. GULDE: Sure, sure, I'm happy to. Excuse me.
15 I'm happy to do that. You know, whether -- I mean, the main
16 idea in this case and why we led with it is our prejudice. And
17 I think characterizing us as being content to let 19 months run
18 is a little bit off the mark.

19 As I said before, we -- the SEC was presented with a
20 very difficult choice in terms of how to try to marshal
21 evidence in this case.

22 And instead of pursuing multitudinous miscellaneous
23 actions, we chose to go forward as we have, believing that we
24 could kick in the discovery process to obtain needed evidence.

25 And notably, I'm not sure we would be having exactly

1 this conversation if not for Mr. Heart's claim when he was
2 describing this in his letter to the Court overtly saying that
3 the SEC is not prejudiced because we've basically had a bite at
4 this apple.

5 To make that claim while knowing you were served with
6 a subpoena, it was galling to me. So that's why I've reacted
7 as I have there.

8 The SEC, as we've stated, is at risk of further
9 spoliation of evidence. And we represent the public interest
10 here. It's hackneyed, but justice delayed is justice denied.
11 And the people, it's my obligation to argue on behalf of the
12 people to air this information and figure out what was really
13 happening here.

14 As to the two main arguments that they've made about
15 personal jurisdiction and extraterritoriality, I would ask Mr.
16 Kuruvilla to discuss it.

17 MR. KURUVILLA: Sure, Your Honor. So just to step
18 back for a second, Your Honor, just to address a point that Mr.
19 Liftik made earlier about one part of their motion, which is
20 that these offerings are not securities, I would just -- and my
21 understanding of the basis of that argument is that there was
22 not a formal contract here between the issuer and the investor.

23 The test for determining whether or not these assets
24 are securities is set forth in the well-known SEC v. Howey
25 case.

1 And the elements for that test are whether or not
2 there's an investment of money in a common enterprise with an
3 expectation of profit from the efforts of the developers.

4 And it's our position and we've pled it in the
5 complaint that the -- that each of those offerings clearly meet
6 the Howey test and that there are -- courts have rejected this
7 argument that there needs to be a formal contract of some sort
8 in order to establish or meet the definition of an investment
9 contract under the definition of what a security is.

10 So we believe that that, you know, portion of the
11 motion is -- as the others are, you know, without merit and
12 that'll be shown, you know, we haven't put together our
13 opposition, but just previewing what our arguments would be.

14 As far as personal jurisdiction is concerned, there
15 we have pled enough in the complaint in our view to clearly
16 establish personal jurisdiction.

17 There are -- the standard of course is whether or not
18 there's been a purposeful availment. There's minimum contacts
19 in the United States or in the forum state.

20 Mr. Heart marketed these offerings. And there is a
21 body of case law and I would say even the Plexcorp case, which
22 Mr. Liftik referenced, in that case, one of the basis that the
23 Court set forth was that contacts were created in the forum
24 state by marketing via the Internet. So that was what was done
25 here. He marketed over social media and websites.

1 There's at least one investor that we know of in
2 Brooklyn who invested in the -- in Hex-based I believe Hex or
3 Pulse with the expectation that there was going to be
4 a -- there was going to be profit by purchasing this digital
5 security. So that's one investor that we know of for sure
6 who's in New York.

7 One-third -- our understanding is that one-third of
8 the web traffic that occurred during the Hex offering came from
9 the United States. And so, Mr. Heart was clearly aware that
10 his marketing efforts were making contacts in the United
11 States.

12 And as I said, at least one investor that we know of
13 is in Brooklyn. And there's the additional fact that we have
14 in our letter that he -- that Mr. Heart engaged with a
15 developer in the U.S. to help program the software for I
16 believe Hex.

17 So we believe there's enough in the complaint to
18 establish, you know, personal jurisdiction. So -- we and
19 again, we'll formulate these arguments further in our
20 opposition.

21 With respect to the Morrison arguments about
22 extraterritoriality, the -- anti-fraud provisions -- let me
23 step back. Congress with the Dodd Frank Act we believe it's
24 our position overrode the Morrison case with respect to the
25 anti-fraud provisions of the securities laws.

1 And it's no longer the test that there has to be a
2 domestic transaction in a security in order for the anti-fraud
3 security provisions to extend extraterritorially.

4 The test rather is the test that existed before
5 Morrison, which is a conduct and effects test. And that's
6 whether or not there's conduct taken in a foreign jurisdiction
7 that has a foreseeable substantial effect in -- domestically in
8 the United States.

9 And we believe all the facts that I laid earlier with
10 respect to personal jurisdiction, the marketing efforts that
11 were the markets of websites, through social media to the
12 United States, that these would establish that, you know, this
13 conduct while taken in a foreign jurisdiction clearly had the
14 effect of creating a securities market here in the United
15 States.

16 So, again, these are all arguments that we'll flush
17 out further in the opposition, but we believe they're
18 meritorious arguments and that, you know, the motion will be
19 defeated.

20 MR. GULDE: And I'm realizing I didn't hit the third
21 one, burden to other folks. A lot is being made of the various
22 names on the caption, but as we said in our letter, Richard
23 Heart can answer these things. And he's a guy who raised a
24 billion. And he's hired all these lawyers to come here. I
25 think he can answer this with -- and recognize that litigation

1 is no joke. And I'm not minimizing that there is a burden on
2 him, but it is not an undue burden.

3 THE COURT: All right, thank you.

4 So, thank you, everybody. That was excellent and
5 extremely helpful.

6 So I'm going to apply the third-part test. The first
7 is whether there's a strong showing that Plaintiff's claims are
8 unmeritorious.

9 And here, the parties have given me a preview of what
10 the motion to dismiss and the opposition will look like. And I
11 can't say that it is a strong showing of lack of merit. I am
12 not in a position to rule on that. That is up to Judge Amon,
13 but on its face, I can't say that there's a strong showing that
14 there's no merit to the claims here.

15 As far as the prejudice to the Plaintiff, I see that
16 the Commission has been trying to investigate this case. And
17 there are many gaps in its knowledge. I haven't heard that
18 it's specific information as to the time sensitivity, but I
19 think as time does go by, it -- there is going to be prejudice.

20 I see the motion to dismiss is not going to be fully
21 briefed until August. There's oral argument in October. And
22 so, it could be next year by the time there's a decision on
23 that.

24 And I don't -- I think in that time, things can get
25 lost. I'm also very concerned as I think Defendant recognizes

1 that the issue of who the parties are needs to be resolved
2 quickly as well so that we can move forward.

3 And if it's an open issue as to whether Hex, Pulse,
4 and PulseX are properly sued and should be brought in, I think
5 that needs to be resolved sooner rather than later so that by
6 the time the motion to dismiss is resolved, we're clear on who
7 they are, whether they're represented, whether they've been
8 served, and we can go forward.

9 So if we were to wait and those questions
10 are -- remain unanswered, I think there is prejudice both to
11 the Commission and also to the conduct of this litigation.

12 And then, the final part about the burden, I
13 appreciate that there's always going to be some burden, but I
14 don't find that it's an undue burden based on the fact that
15 this case is -- there isn't a strong showing that the case is
16 going to be dismissed, and therefore, that Mr. Heart would be
17 relieved of any obligation to engage in litigation.

18 And so, given where we are since it's -- and in light
19 of the fact that there is quite a bit of third-party discovery
20 that needs to go forward, I think the burden on Mr. Heart is
21 not -- weighing everything, I don't think it outweighs the need
22 for the discovery in this case.

23 I also consider Mr. Liftik's proposal that you not
24 engage in electronic discovery until later. I don't think
25 that's a good idea, because it seems to me that almost

1 everything in this case is likely to be electronic, given the
2 way the facts have been described. So while that is sometimes
3 appropriate, I don't think that that makes sense here.

4 Now if the parties want to engage in a discussion as
5 to how the discovery should go forward in an orderly and
6 efficient and effective way, you're free to do that.

7 So, it may be that you can get discovery very quickly
8 on these three mystery Defendants to figure out who exactly
9 they are, and can they be sued, and have they been served, and
10 who can -- how they can appear, I think that that should go
11 forward quickly.

12 Which is not to say that the other information, other
13 discovery should not go forward, but if the clients -- if the
14 parties want to have a discussion about how to move forward,
15 you're free to do that. And so, I will require that you meet
16 and confer and come up with a discovery plan.

17 And so, like I said, you're free to stage the
18 discovery in the coming months to say this part will happen by
19 this date, this will happen by that date, but I do need to have
20 a proposed discovery plan, so that I can enter a scheduling
21 order in this case and let the motion to dismiss play out
22 before Judge Amon according to her schedule.

23 So why don't I give the parties three weeks to come
24 up with a discovery plan? And that will take us to May 2nd.
25 So no later than May 2nd, I would like to see a proposed -- a

1 joint proposed scheduling order.

2 I have a form that you can fill out. I think it's
3 useful to have it in that grid format, but if the parties want
4 to do something else, and like I said if you want to be more
5 detailed as to interim deadlines, you're free to do that, okay,
6 but use that as a guide.

7 And you should have dates for the completion of fact
8 discovery. And then, if you're intending to have expert
9 discovery, a proposal for that as well.

10 And then, I will consider it. If it's clear based on
11 what you've submitted to me that there aren't any disputes and
12 you're proposing that and if it looks reasonable, I can
13 certainly just enter it, but if I have any questions or if the
14 parties have disputes as to the content of that discovery, I
15 will have another conference and then we can talk about it.
16 Okay.

17 So, at the interim conferences, I tend to have by
18 phone because I think that way, I can schedule them more
19 quickly. My goal is always when I see a dispute that the
20 parties have raised jointly to just schedule it within a matter
21 of days.

22 The initial conference, it's useful to have everybody
23 in person and I appreciate seeing everybody. But just to let
24 you know, unless there's a good reason to bring everybody in, I
25 usually do that by phone, which again, is not to say that if

1 there's a discovery dispute that I think would benefit from
2 having everybody in the room together, I wouldn't have a
3 conference in person, but that's just to give you an idea of
4 how I generally manage cases.

5 Is there anything else that we need to discuss today?
6 Mr. Gulde?

7 MR. GULDE: Not from the SEC, Your Honor.

8 THE COURT: All right, Mr. Liftik and team?

9 MR. LIFTIK: Nothing, thank you, Your Honor.

10 THE COURT: All right, very good. So I will look for
11 that proposed -- the joint proposed scheduling order as we move
12 forward with the case management here. Thank you, everyone.

13 MR. KURUVILLA: Thank you, Your Honor.

14 (Proceedings concluded at 11:27 a.m.)
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CERTIFICATE

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Chris Hwang*

May 14, 2024

Chris Hwang

Date

Court Reporter